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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 383

GENERAL BOX COMPANY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent

Brief on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the District Court denying the government's motion to dismiss (R. 30-33) is reported at 94 F. Supp. 441. The Court's opinion after the first trial (R. 229-242) is

reported at 107 F. Supp. 981. The final opinion of the Trial Court following a new trial (R. 246-255) is reported at 119 F. Supp. 749. The opinion of the Court of Appeals (R. 262-284) is reported at 224 Fed. (2d) 7.

JURISDICTION

Federal jurisdiction was invoked in this case under the provisions of 28 U.S.C. 1346. The judgment of the Court of Appeals was entered on June 17, 1955 (224 F. (2d) 7; R. 285). A petition for rehearing was filed July 7, 1955, within the time provided for by the rules of the United States Court of Appeals, Fifth Circuit (R. 285-291), and the petition was denied (Circuit Judge Can on dissenting) on August 5, 1955 (R. 291). The petition for a writ of certiorari was filed on September 12, 1955, and certiorari was granted on November 7, 1955 (R. 291). This court had jurisdiction to consider and grant this petition pursuant to Title 28, USCA Section 1254(1).

QUESTIONS PRESENTED

1. The question here presented to the Court was stated by Circuit Justice Cameron in a dissenting opinion in the Court below in the following terms:

> "Can the United States Government, without just compensation confiscate and destroy for its own monetary gain, the valuable timber of appellee growing on lands of others, basing its right so to do on the claim that the lands are batture; when state authorities have taken no official action and made no minute entry towards exercising the servitude against the lands or the timber, and have taken no steps at all to that end beyond giving

written notice to the land owners (but not to appellee) four months after confiscation had begun and one month after the destruction of appellee's timber had been completed."

2. In the event this Court reverses the judgment of the Court of Appeals an incidental question as to the interest to be allowed on the judgment is presented.

STATUTES INVOLVED

The pertinent portions of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., Secs. 702a(12), 702b, and 702c, Act 188 of 1904, L.R.S. 9:1903 of the Louisiana Legislature, Article XVI, Sections 5 and 6 of the Louisiana Constitution of 1921, Articles 455 and 665 and 2924 of the Louisiana Civil Code of 1870 are printed as an appendix, infra, pp. 30-34.

STATEMENT

The General Box Company instituted two suits in the United States District Court for the Western District of Louisiana, invoking the jurisdiction of that Court under the provisions of the Tucker Act, 28 U.S.C., Section 1346, to recover the value of timber destroyed on two tracts of land by contractors of the United States in the enlargement of an existing levee on the main stem of the Mississippi River in Louisiana. The sum of $9,000 was demanded in each case. A total of 260 acres of timber on land lying between the old levee and the river was damaged or destroyed. The cases were consolidated for trial.

The material facts out of which this controversy arose are as follows:

The General Box Company acquired this timber through deeds properly recorded before the Government or Levee Board took any action toward the enlargement of the levee or the destruction of the timber. Under the provisions of Act 188 of 1904, Louisiana Revised Statutes 9:1103, infra, p. 31, standing timber in Louisiana is classified as an immovable and is subject to all laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands.

The levee enlargement project was undertaken in 1947 pursuant to the provisions of the Federal Flood Control Act of May 15, 1928, 45 Stat. 535, as amended, 33 U.S.C., Secs. 702a, et seq. which obligated the Levee Board, among other things to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River."

Under Article XVI, Section 5 of the 1921 Louisiana Constitution, infra, p. 32, the Board of Commissioners of Levee Districts are authorized to cooperate with the Federal Government in the construction of levees. By resolutions adopted in 1928 and 1929 the Board of Commissioners of the Fifth Louisiana Levee District, which is the Board here involved, agreed to "provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River." (R. 150, 292-293; Exhibits G-1, G-2). These two resolutions had no reference to any particular land but served merely to pledge to the United States Government that the Levee Board would carry out its obligations under the Flood Control Act.

On May 19, 1947, the Department of Public Works of

the State of Louisiana wrote the President of the Levee Board as follows (R. 150, 295; Exhibit G-3):

> "We are in receipt of a letter from Colonel John R. Hardin, District Engineer, New Orleans District, U.S. Engineers, dated May 9 together with project plans of the proposed enlargement of the Brabston and Ashland Levees south of Vidalia, Louisiana.
>
> "We have examined these plans and it is recommended that your Board concur with Colonel Hardin in enlarging these two low sections of levee in accordance with plans, provided that provisions are made for draining existing gravel road on crown of old levee."

and on June 10th of the same year, the Engineers forwarded plans of the proposed enlargement to the Levee Board and requested that "this District be furnished with a formal statement by your Board that the rights of way are available for the construction of the enlargement and granting the United States a right of entry to prosecute the work." It was said that the "statement may be in the form of a letter signed by the president of the Board." (R. 151, 296; Exhibit G-4).

On June 12, 1947, the President of the Levee Board replied to this letter as follows (R. 151, 297; Exhibit G-5):

> "This is to acknowledge receipt of your letter of June 10th, with the enclosed drawings for Item M-343-R, A-E, Brabston Levee Enlargement and Item M-337-R, A-F, Ashland Levee Enlargement and requesting that you be furnished the formal statement by this Board that rights-of-way are available for the construction and enlargement and granting the United States a right of entry to prosecute the work.

"The Board of Commissioners of the Fifth Louisiana Levee District hereby is glad to comply with your request and render you any assistance possible."

The President of the Levee Board purportedly acted under a resolution passed by the Board on September 12, 1945, some two years prior to the beginning of the work in this case, which reads as follows (R. 151, 297; Exhibit G-6):

"Due to the fact that in emergency levee work delays are at times caused by the necessity of waiting for rights-of-way until the next regular Board Meeting, Commissioner Yerger offered the motion, seconded by Commissioner Guenard, and unanimously approved, that the President of the Board, Mr. A. T. Shields, be and he is hereby authorized and empowered on behalf of the Board of Commissioners, Fifth Louisiana Levee District, to grant rights of way where the need is immediate, the proper right-of-way resolutions to be passed in the regular manner at the following Board meeting."

The record does not show that the Levee Board thereafter ever passed a right-of-way resolution. It was shown by an extract from the minutes of a meeting of the Board held on July 9, 1947, that the only action taken with respect to the President's letter was the following (R. 151, 298; Exhibit G-7):

"A letter dated June 10, 1947 was read to the Board from Lt. Colonel Alvin R. Moore, Executive Officer of the New Orleans District, requesting a formal statement from this Board that rights-of-way are available for the construction of the Brabston Levee Enlargement, Item M-343-R, A-E, and the Ashland Levee Enlargement, Item M-337-R. This request was complied with by a letter signed by the

President of this Board and dated June 12, 1947, which letter was read to the Board."

This minute entry does not purport to show that emergency action was required, does not apply to plaintiff's property, does not set up any machinery for exercising an appropriation, or provide for notice to any property owner.

On July 15, 1947, the Engineers wrote the Board that instructions to begin the work had been issued July 10th (R. 151, 299; Exhibit G-8). The work was begun on one of petitioner's tracts on July 22nd and on the other on August 11th (R. 199).

Under Article XVI, Section 6 of the Louisiana Constitution of 1921, infra, p. 32, payment is authorized not to exceed the assessed value in the preceding year for lands and improvements, other than batture, taken or destroyed for levee purposes. In order to comply with this provision, the Board requested from the Assessor a list of property owners within the area on June 20, 1947 (R. 152, 300; Exhibit G-10). No reply was received, and on July 18, approximately a month later, a second letter was sent to the Assessor reminding him that he had not replied to the first (R. 152, 301; Exhibit G-11). Finally, by letter dated July 31, 1947, the list was furnished (R. 152, 302; Exhibit G-12). Plaintiff was not included on the list for the reason that the title to the timber was not separated from the title to the land until the latter part of 1946 when the assessment rolls had already been made up, and both land and timber had been assessed to the owner of the fee without separate assessment of the timber. The owner of the fee in the two tracts involved, was on the assessment list

and was notified of the levee enlargement (R. 152, 304; G-14).

Although the work had commenced in the latter part of July on one tract and in August on the other, the notices, were not sent out until October 10th, several weeks after the destruction of the timber had been completed. The notice read in part as follows (R. 152, 304; Exhibit G-14).

> "We respectfully request that any buildings, timber or other obstacles which might be within the rights of way be removed prior to the time that the contractor begins work."

The letter referred to the fact that the President of the Board was advised that its inspector had previously notified some of the parties. No notice at all had been given to petitioner. The belated suggestion contained in the notice that timber could be removed by the owner was not only untimely as shown, but it was impossible in view of the provisions contained in the construction contracts between the Government and the contractors hereafter discussed.

The General Box Company having received no notice whatever, as shown, learned of the project before the notices were sent out after the destruction of its timber had begun (R. 83). The work had commenced on one of plaintiff's tracts on July 27, 1947, and on the other August 11, 1947 (R. 199). The destruction was by private contractors employed by the United States. When the contractors were asked by the General Box Company to discontinue and allow the company to cut the timber which remained, the request was refused because the contracts had been let by specific specifications on

the basis of bulldozing the standing timber (R. 84; Exhibits P-6, 7; R. 77). The contractors refused to cease the destruction of the remainder and to permit the General Box Company to go ahead of the bulldozers and remove its timber because their contract gave them the right to remove and destroy the timber (R. 84). The United States benefited financially from such destruction, as it was shown that **this was a less expensive method than removing stumps which salvaging operations would leave** (R. 188, 204). Admittedly, that was the only reason the plans of the Government so provided; there is no claim that the method had any peculiar relation to "levee purposes" or flood control in any sense. The area upon which the timber was growing was between the levee and the river. The Government required a place between the levee and the river to obtain dirt for the enlargement. The trees were destroyed and removed for the purpose of creating an area from which the dirt could be obtained. The timber was not used in any way whatever in carrying out the levee enlargement.

The action taken by the Government with respect to petioner's timber is virtually admitted by the United States. On page 4 of the Government's brief in opposition to petition for writ of certiorari, the following statement is made:

> "Thereafter, private contractors employed by the United States commenced clearing the land. Petitioner was not notified and did not learn of the work until after the destruction of its timber had begun. When the contractors were asked by petitioner to discontinue and allow it to cut the timber which remained, the request was refused because the contractors' bids had been made on the basis of bulldozing the standing timber. This was a substantially less expensive method than removing the stumps which petitioner's salvaging operation would leave. Their

contracts with the United States authorized pushing the trees over and out of the area."

The General Box Company instituted these actions against the United States to recover the full value of the timber destroyed by the Government contractors. The United States filed a third party complaint bringing the Levee Board in as a defendant (R. 33, 56). It also moved to dismiss the complaints as not stating claims upon which relief could be granted, but this was denied (R. 27; 54, 30; 94 FS 441).

Following a trial, the District Court held that the United States was liable for the full value of the timber, but could recover over against the the Levee Board (R. 229; 107 FS 981). On motions for a new trial by the United States and the Levee Board (R. 242), further proceedings were had after which the Court held that there had been no effective appropriation by either the Government or the Levee Board; that the Levee Board should have acted at least through a resolution, with notice to all record owners so as to give them an opportunity to be heard and enter into negotiations for an opportunity to salvage their property; that the destruction of the timber was by the United States through is contractor, thereby creating in the absence of acquisition of the legal right to do so the implied obligation to pay for what it took and destroyed (R. 246; 119 FS 749). The Trial Court, accordingly, dismissed the suits as to the Levee Board and entered judgment against the United States for the full value of the timber in the sum of Ten Thousand Eight Hundred One Dollars ($10,801) (R. 256). Interest was allowed at four per cent. from date of judgment to thirty days after approval of any appropriation act providing for payment. The United States appealed to the Court of Appeals for the Fifth Circuit. The

General Box Company appealed from that part of the judgment allowing interest from date of judgment instead of from date of the taking, and from that part of the judgment fixing interest at four per cent instead of five per cent.

The Court of Appeals in an opinion rendered on June 17, 1955 (R. 262; 224 F. (2d) 7), Circuit Judge Cameron dissenting, held that the United States was not liable because it received the right of way from the Levee Board which correctly appropriated it without compensation under a riparian servitude; that the United States was not liable under State law because State law does not apply to it; that it was not liable under Federal law because it succeeded to the rights of the State, and if no compensation was due from the State none was due from the United States, which acts in the place of and for the State; that since the timber had already been taken by the Levee Board under its right of appropriation, the United States could not be said to have taken it from the plaintiff under an implied promise to pay for it. The General Box Company timely filed an application for rehearing (R. 285) which was denied on August 5, 1955 (R. 291).

A petition for certiorari was filed in this Court on September 12, 1955, on the ground that the opinion of the Court of Appeals was in conflict with the applicable law of the State of Louisiana, and that the Federal questions involved in the case under the Fifth and Fourteenth Amendments had been decided in a way which was in conflict with applicable decisions of the United States Supreme Court. Certiorari was granted on November 7, 1955 (R. 291).

SUMMARY OF ARGUMENT

1. Although property bordering upon a navigable stream in Louisiana is subject to a riparian servitude for levee purposes, the servitude, under Louisiana law, is limited by the reasonableness of its use, and the Courts will review the actions of administrative authorities in the exercise of the servitude where oppression and injustice is shown.

2. Due process protects the individual against arbitrary action and requires governmental officials to conform their actions to accepted standards of fair play whether those safeguards are set forth in statutes or regulations or derived from the common acceptations of what is fair in dealings between man and man.

3. Where the government is required to make just compensation for property taken for a public use, interest at the legal rate should be allowed from the date the property is taken.

ARGUMENT

I

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH THE APPLICABLE LAW OF THE STATE OF LOUISIANA

It must be conceded that under the civil law of Louisiana property bordering upon a navigable stream is subject to a riparian servitude for levee purposes under Articles 455 and 665 of the Louisiana Revised Civil Code, and that there is no formal procedure prescribed under Louisiana law which levee

districts must follow in order to appropriate such property where this servitude is otherwise properly exercised. *Danziger v. U. S.*, 93 Fed. Supp. 70 (Eastern District of Louisiana, 1950). However, the servitude for making and repairing levees established by Articles 455 and 665 is limited by the reasonableness of its use, and when that limit is exceeded and oppression and injustice to the property owner is shown, the Courts will review such action. *Pruyn v. Nelson Bros.*, 180 La. 760, 157 So. 585 (1934).

The principal ground upon which the Court of Appeals based its opinion was that the Levee Board correctly followed the requirements of Louisiana law in exercising its right of appropriation, and thus the United States could not be said to have taken the plaintiff's property under an implied promise to pay for it. The Court was of the opinion that no notice was necessary in the appropriation of a right of way for a levee and also, that notice was given to all persons shown by the tax assessor's rolls to be the owners.

The majority opinion in this case was erroneous in its conclusion that under the law of Louisiana servitudes for levee purposes may be exercised without notice to the property owners. An analysis of the authorities cited by the majority opinion, show that none of them sustains the proposition that no notice is required, and that, although no formal procedure is prescribed for exercising the right of appropriation, as is required under an expropriation, no greater sacrifice of private rights may be made than the public welfare demands, and the power to appropriate cannot be arbitrarily or capriciously exercised.

The first case cited by the Court in support of the propo-

sition that no notice is required is *Danziger v. U. S.*, 93 Fed. Supp. 70. In that case while the Court said "there is no formal procedure which levee districts must follow in appropriating property" in the exercise of the servitude, the Court did not hold that no procedure and no notice of any kind was required. **Actually in that case the Board of Commissioners passed a resolution to appropriate the specific property involved and notices were sent out by registered mail to all property owners** of the fact that the land in question had been appropriated for levee purposes, and **the Levee Board actually set about the business of physically removing all improvements at its expense.** It was only after these steps were taken that the United States called for sealed bids and made an award of the contract.

In the present case the petitioner was not notified and did not learn of the work until after the destruction of its timber had begun by the Government contractors under plans and specifications prepared by the Government prior to any action by the Levee Board, and under plans and specifications which specifically authorized destruction of the timber solely because the United States benefited financially from such destruction. Petitioner was not even permitted by the contractor to cut and salvage the timber after this discovery was made.

The next case cited by the majority opinion was *Dickson v. Board of Commissioners*, 210 La. 121, 26 So. (2d) 474, which did not deal with the question of notice, or the proper procedure to follow in effecting an appropriation. However, the Court did point out that the actions of levee boards are subject to review in cases of palpable abuse of their powers.

In *Board of Commissioners v. Trouille*, 31 So. (2d) 799, which is also relied on in the majority opinion, the appropriation was carried out under an act of the Louisiana legislature which required that before a right of way was appropriated "the exact location thereof shall be determined and made to appear by a proces verbal prepared by the Board of State Engineers of the State of Louisiana and filed in the conveyance records." The Court held that there had been a substantial compliance with the provisions of the act with respect to the notice required.

Petitioner respectfully shows that there is no authority for the conclusion of the Court below that this servitude can be exercised against the property of a citizen without notice, and certainly, there is no authority for the exercise of such a servitude without any action whatsoever by the Levee Board.

The Louisiana courts, to the contrary, have held that the power conferred is not arbitrary and that a citizen has a judicial remedy where oppression or injustice is shown.

In *Peart v. Meeker*, 45 La. Ann. 421, 12 So. 490, the Supreme Court of Louisiana said the following:

> "It is undoubtedly the duty of the public officers charged by the State with the execution of its police power to make no greater sacrifice of private rights than public welfare demands. In several cases this court has said the power so conferred is not arbitrary and that the citizen is not without proper remedy to subject it to judicial control in proper cases."

In *Pruyn v. Nelson*, 180 La. 760, 157 So. 585, the Louisiana Supreme Court said:

"This servitude is limited only by the reasonableness of its use, and the administrative officers of the State of Louisiana are charged with determining that limit, subject to review by the courts only when oppression or injustice is shown and proved."

See also *DuBose v. Levee Commissioners*, 7 La. Ann. 165; *Egan v. Hart*, 45 La. Ann. 1358; *Wolfe v. Hurley*, 46 Fed. (2d) 515.

The majority of the Court was also of the opinion that notice had been given to all persons shown by the assessment rolls to be owners and that under the settled jurisprudence of Louisiana no compensation was due for the exercise of the servitude, (1) if the land is batture, Art. XVI, Sec. 6, Louisiana Constitution forbids payment for batture used or destroyed for levee purposes, and (2) if it is not batture, the same article restricts compensation to properties which have been assessed.

However, the purported notice to which the majority opinion refers, was a notice given by the President of the Levee Board dated October 10, 1947, approximately three months after the work commenced and several weeks after petitioner's timber had been destroyed. It is thus difficult to see how any such notice can be relied upon, particularly in view of the fact that plaintiff was the record owner of the timber and the fact of its assessment or non-assessment is immaterial as will be hereinafter shown.

It is conceded that the land upon which the timber stood should be classified as batture, but Section 6 of Article XVI of the Louisiana Constitution of 1921, which forbids payment for batture used or destroyed for levee purposes, is manifestly

not applicable, as this article insofar as it applies to batture, as well as non-batture lands subject to the servitude, only applies where the destruction is for levee purposes, and not merely to save money, and in any event, under this article, arbitrary and capricious action is prohibited, and the land owner has redress where oppression and injustice are shown. In respect to these principles there is no distinction between batture subject to the riparian servitude and non-batture subject to the riparian servitude. The rule as to no payment in the one case and a payment of assessed value in the other case only applies where the riparian servitude is being exercised for levee purposes, or in any event, only where the servitude is reasonably and properly exercised. For these reasons it is immaterial as to whether or not the property be classified as batture, and the issue of assessment or non-assessment raised by the majority opinion is likewise immaterial.

The majority opinion apparently proceeded on the assumption that the owner of batture has no property right of any kind in such ownership entitling him to any protection even as against willful confiscation and unnecessary destruction of his interest therein. The correct position as to this is fully developed in the dissenting opinion of Judge Cameron from which the following is quoted:

> "It is difficult to understand the position of the majority in holding that the United States had the right to make this assault upon the property of appellee without affording appellee the slightest chance to protect itself, indeed, while forbidding appellee to undertake such self-protection. It is not sufficient to say that appellee bought the timber knowing that it was subject to the exercise of servitude. The majority refers to the rights of such a property owner as if they were possessed of no substance

at all. Here is the way the court below describes the kind of property right appellee had in its timber:

> " 'Notwithstanding the servitude of the civil law, just mentioned, lands fronting on a navigable stream and everything on them having value as property belongs to the riparian owner, down to the mean low water line, L.S.A.-C.C. Articles 455, 457, and may be used, bought and sold even after the construction of levees, the same as any other private property. Timber, oil, gas and other minerals may be taken therefrom by the owner, subject, of course, to the right of the state to insist that levees, public roads, etc., shall not be interfered with or damaged.'

"What then, are the rights of the owner of such private property if it be timber, oil, or similar property? If appellee had erected oil derricks under a proper lease, or had constructed oil storage tanks, would it be held that the State of Louisiana or the United States could destroy or confiscate that property without notice or without giving the owner a chance to salvage it? If dwelling houses or places of business such as wharves were used in the legitimate enjoyment of such property rights, could they be similarly destroyed or confiscated? Is timber any different from oil derricks, storage tanks and structures?"

This statement as to the property rights of an owner of batture is fully supported by all of the Louisiana cases, summed up in an excerpt from which we quote found in *Seibert v. Conservation Commission of Louisiana*, 159 So. 375, in which the Supreme Court of Louisiana said the following:

"It is the well-settled jurisprudence of this state that the contiguous riparian proprietor owns the banks of the

river attached to his property, and this includes the alluvion or batture; and that the banks or rivers and/or streams is the land between the ordinary high-water mark and the ordinary low-water mark. What is the ordinary low-water mark of the Mississippi River? The levee of the Mississippi River, by statute, is designated as the ordinary high-water mark. State v. Richardson, 140 La. 329, 72 So. 984; Wemple v. Eastham, et al., 150 La. 247, 90 So. 637; Pizanie v. Gauthreaux, 173 La. 737, 138 So. 650; Smith v. Dixie Oil Co., 156 La. 691, 101 So. 24; Boyce Cottonseed Oil Manufacturing Co. v. Board of Commissioners, 160 La. 727, 107 So. 506."

A procedure which might well have been followed by the Levee Board in the present case is set forth in the recent case of *Board of Levee Commissioners of Orleans Levee District v. Kelly, et al.*, 225 La. 411, 73 So. (2d) 299 (1954). This was a proceeding for a mandatory injunction against some sixty or more individuals who were occupying dwellings situated on the batture along the Mississippi River in Orleans Parish, Louisiana. The defendants concededly occupied the batture without vestige of title or legal right. They were not riparian owners nor did they claim any rights as riparian owners. The Levee Board was requested to provide certain rights of way to the Army Engineers in connection with an enlargement of the levee. The Levee Board gave notice to all batture dwellers to clear the levee of all buildings and other constructions. Despite the fact that these batture dwellers had no title, and were not riparian owners, they refused to move their dwellings from the batture. Rather than arbitrarily proceeding with the levee improvement the Levee Board filed a suit for a mandatory injunction to require these parties to remove their structures. Certainly if the Levee Board in that case gave proper notice, and after failure to comply with the notices

sought a mandatory injunction, the petitioner in this case, who had a valid recorded title to the timber on the batture, was entitled to more consideration than these parties who did not even have a vestige of title.

In view of the foregoing, it is respectfully submitted that the Court of Appeals erred in its application of the law of the State of Louisiana to the facts of this case; that the Levee Board did not properly exercise its right of appropriation; that, therefore, the Government could not derive any rights from the Levee Board upon which it can rely; and, that, the destruction of plaintiff's timber by Government Contractors, pursuant to the plans and specifications prepared by the Government Engineers, and without notice to plaintiff, and without affording to plaintiff an opportunity to salvage the timber, created an implied promise under the Fifth Amendment to pay for the timber so destroyed.

II

THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION INVOLVED IN THIS CASE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT

Circuit Justice Cameron in his dissenting opinion very forcefully and eloquently stated the reasons why the action taken by the Government was contrary to the requirements of the Fifth Amendment. Petitioner quotes the following from his opinion and adopts it as its argument (R. 280-284).

> "It is clear that the court below felt that the actions taken by appellant were repugnant to the just compensation and due process clause of the Fifth Amendment of

the Constitution, and no one would question that the United States was fettered at every stage of the proceedings by their terms. In dealing with the property of its citizens, the great and powerful government should keep its action above suspicion of unconstitutionality and as far as possible away from the border line of such a charge.[20]

"We need not pause to discuss the requirements of the Fifth Amendment that the United States is not permitted to take private property for public use without just compensation beyond observing that it hardly seems fair that the salutary provisions of the Amendment should be nullified by the indirect method of taking provided for in the amended Flood Control Act.[21] We pass up further discussion of that clause because it seems so clear that the action of the Government cannot be squared with the due process provisions.

"The Government sent its contractors onto this land and began destroying wealth in a manner which can be characterized as nothing but reckless, whether practiced by an individual or by the sovereignty. The trees it set about destroying had economic values which should have been conserved under the most rudimentary concepts of what is fair and right and consistent with husbandry.

"The most superficial inquiry would have revealed the owner of this timber because the deeds were of record. The government had taken initial steps to begin the

"20 Mr. Justice Holmes well expressed the idea in Federal Trade Commission v. American Tobacco Co., 1924, 264 U.S. 298, 307: 'We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law.'"

"21 It is worthy of note that the Amended Act, 33 U.S.C.A. Cumulative Supplement, 702a-12 provides for reimbursement by the United States of local authorities of reasonable expenditures under local laws and customs; and the government engineer testified that 'since 1941 the Federal Government has been paying a fair market value for lands used or destroyed in the carrying out of flood control plans.'"

prosecution of this work four months before the date of actual beginning. The only precaution it had taken was to write a letter to the Levee Board requesting that it be 'furnished a formal statement by your board that rights-of-way are available for the construction of the enlargement.' If the investigation had been pursued, the government would have found that the Levee Board had not taken any steps or made any minute entries relating to these particular lands or this timber, had not made the first move towards a formal expropriation of the rights of way or the timber on them, and had not notified the property owners that any expropriation was in contemplation, or that any entry upon their lands would ensue.

"The simplest dictates of fairness would have required, in any event, that the Government give the property owners the opportunity to remove things of value from the right of way before their destruction should be begun. If the government had the right to begin destroying timber without notice, it would have had the like right to turn waters upon the lands of these owners without affording opportunity to remove livestock. Whatever muniments of title the Government may have had to the right of way, and whatever assurances it may have possessed with respect to right of entry upon the lands, it had no right whatever to make its entry in such a harsh and ruthless way and with such a wanton disregard of all of the dictates of justice and humanity.

"The foregoing considerations are based upon the assumption that the destruction of the trees was inadvertent and innocent. The fact is, however, as conceded by the government, that the destruction was deliberate and was planned from the outset, and such planned destruction was disclosed to the Levee Board when the government engineers forwarded to that Board a set of the plans on May 19th.

"The Government could save money by permitting the contractor to push whole trees off of the land it was clearing so that dirt might be obtained for levee purposes, instead of permitting appellee to fell and remove the timber, leaving the stumps to be removed by the contractor. 'This was a substantially less expensive method than removing the stumps which appellee's salvaging operation would leave.'[22] That statement from the government's brief, followed by the assertion 'It was pushed over, and thus destroyed, by bulldozers because the contractors' bid was substantially reduced "on the basis of that method of removing the timber" ', leaves no room to doubt that the Government made its plans and let its contracts on the basis of the destruction; and that is verified by the refusal of the contractors to comply with appellee's request, made as soon as he discovered the depredations, that he be permitted to cut the timber which remained in front of the bulldozers.[23]

"But such a course is forbidden by the due process clause of the Fifth Amendment, and what the courts have said in defining its scope and application. Mr. Justice Lamar, speaking for the Supreme Court in a case involving a forced tract connection by a railroad,[24] laid down the rule that such an order could not be sustained, 'merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable * * * '; and held further that the railroad must not be denied the right to show that 'the order was so arbitrary, unjust or unreasonable as to amount to deprivation of property * * * '. And the Supreme Court also held[25] that the Fourteenth Amend-

"22 See statement from government brief, Note 2, supra."
"23 Ib."
"24 Washington, ex rel v. Fairchild, et al, 224 U.S. 510, 524."
"25 Missouri, ex rel v. North, et al, 271 U.S. 40, 42."

ment 'is concerned with the substance and not with the forms of procedure'.

"Mr. Justice Brandeis, in his concurring opinion in the St. Joseph Stockyards case,[26] first used the term 'inexorable safeguard' in holding that no step in a proceeding affecting the rights of a citizen shall be taken 'except upon due notice and opportunity to be heard'. Mr. Justice Cardozo[27] defined due process as 'the protection of the individual against arbitrary action', and repeated again that its essence was the observance of 'the rudiments of fair play.'

"That decision was cited by us in our recent case of City of Meridian v. Mississippi Valley Gas Co.,[28] a case in which we affirmed the action of the lower court in restraining the enforcement of a city ordinance passed without constitutionally adequate notice. We also cited the case of Morgan v. United States in which the Supreme Court twice[29] reversed administrative proceedings for failure to observe the 'fundamental requirements of fairness which are of the essence of due process'.

"And we have recently, in Arndt v. United States,[30] held that government officials must conform their actions to accepted standards of fair play whether those standards are set forth in statutes or regulations or derived from the common acceptation of what is fair in dealings between man and man.

"What the government did in the present case is at war with all of those concepts and ought to be rejected by us, whether we base the rejection on the failure of the Levee

"26 St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 73."
"27 Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 302."
"28 214 F. 2d 525, 526 (1954)."
"29 298 U.S. 468 and 304 U.S. 1."
"30 222 F. 2d 484."

> Board to observe Louisiana law or upon the higher ground of failure of the United States to observe common standards of justice and fair play. I do not think this court should give its support to such wanton, unjust and unconstitutional actions. I think the judgment of the District Court was right and should be affirmed."

In addition to what Circuit Justice Cameron said above, we believe that a statement by this Honorable Court made in the case of *Betts v. Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256; 86 L. Ed. 1595, is particularly appropriate here. In that case this Court made the following statement:

> "* * * Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

Looking to the "totality of the facts" in this case, it is manifest that the action taken by the Government was contrary to the requirements of due process, and that its actions should not be sanctioned.

III

INTEREST AT THE LEGAL RATE OF FIVE PER CENT (5%) FROM THE DATE OF ACTUAL TAKING SHOULD BE ALLOWED ON THIS CLAIM

The District Court fixed the damages in the sum of $10,801, as the actual value of the timber destroyed. The formal decree (R. 256) restricted interest on the judgment to four per cent (4%) from the date of the judgment, rather than from the date of the actual taking. The petitioner here gave notice within the time allowed of its intention to prosecute an appeal to the Court of Appeals "from that part of the judgment entered in the above actions on May 17th, 1954, wherein plaintiff was awarded interest on the judgment from date of said judgment rather than from date of actual taking on or about November 1, 1947." (R. 257). The latter is a conservative "taking" or "beginning" date, as admittedly the contracts were let on July 10th and July 11th, 1947, and certainly a legal taking occurred at that time. The work of destroying the trees had been completed by November 1, 1947.

The District Court did not give any reasons for restricting the interest to the date of the judgment. It is rather plain from the other provisions of the decree, however, that what the Court has in mind is:

Section 2516, Title 28 U.S.C.A.:

"(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.

"(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at the rate of four per cent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed after the term of the Supreme Court at which the judgment was affirmed. June 25, 1948, c. 646, 62 Stat. 978."

Here petitioner's recovery is under the Tucker Act, the action being brought for the just compensation under the Fifth Amendment that is available in such cases.

In 54 Am. Jur. 609, Sec. 95, it is said:

"It is a well-settled rule that the United States is not liable for interest on claims against it unless by the terms of an act of Congress it has assumed such liability, or has, by a lawful contract of its administrative or executive officers made within the scope of their duly constituted authority, bound itself to pay interest by a stipulation therefor, **or unless it must pay interest as a part of the just compensation which it is required to make for property taken. . . .**" (Emphasis ours.)

A number of cases were cited by the Government below in support of the suggestion that the interest was to be restricted as is provided in the said Section 2516. The Court apparently applied that principle.

The cases relied upon by the Government below are inapplicable because of peculiar factual distinctions. The cases that are governing are *Seaboard Airline Railway Co. v. United States* (261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664); *Danforth*

v. United States (303 U.S. 271, 60 S. Ct. 231, 84 L. Ed. 240) and *Jacobs v. United States* (290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142).

The *Jacobs* case is the latest expression of the United States Supreme Court upon the point under facts similar to the present.

In that case plaintiffs, owners of land along a certain body of water in Alabama, were damaged by intermittent floods caused by a Government dam across a body of water. Negotiations for the Government to get flowage easements were undertaken but the land owners being dissatisfied with the amounts offered brought suit under the Tucker Act. They were awarded judgment for value of property damaged with interest from the date of taking. It is to be noted that no formal condemnation proceedings of any kind had been filed by the Government. On appeal, on question of interest alone, the Court of Appeals held that the suits were founded upon an implied contract and hence, that interest could not be allowed. Citing *United States v. North American Transportation and Trading Company* (253 U.S. 330, 64 L. Ed. 935, 40 S. Ct. 518), one of the cases relied upon by the Government below.

The Supreme Court granted certiorari and reversed the Court of Appeals saying:

> "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that it was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right."

The Court went on to dispose of the *American* case in the following observation:

> "The North American Transportation and Trading Company case rested upon its special facts. There the original taking was torturous and created no liability on the part of the Government. Subsequent action was held to create a liability which rested upon an implied contract. The Court said that the suit was not founded upon the 5th Amendment (253 U.S. 334-335). Suits brought to enforce the Constitutional right to just compensation are governed by later decisions which are directly in point."

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that the decision of the Court of Appeals is manifestly erroneous and should be reversed; that petitioner should be awarded damages as fixed by the District Court, and should be allowed interest at the legal rate of five per cent (5%) from the date of taking until paid.

Respectfully submitted,

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By _____

APPENDIX

The pertinent portions of Seetion 3 of the Flood Control Act of May 15, 1928, as amended, 33 U.S.C., are contained in Sections 702a (12), 702b and 702c, as follows:

"§ 702a-12. Same; modified Lower Mississippi River Project as of August 18, 1941 . . .

"(d) The Chief of Engineers, with approval of the Secretary of the Army, shall reimburse local authorities for actual expenditures found by the Chief of Engineers to be reasonable, for providing at the request of the United States, in accordance with local legal procedure or custom, rights-of-way and flowage easements required for future setbacks of main-line Mississippi River levees. . . ."

"§ 702b. Same; local contribution toward cost of flood control work . . . in view of the great expenditure estimated at approximately $292,000,000, prior to May 15, 1928, made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that River; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving floodwaters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required. (May 15, 1928, c 569, § 2, 45 Stat. 535)."

"§ 702c. Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights. Except when

authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of this act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of Section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes."

Act 188 of 1904 of the Louisiana Legislature is as follows:

"Providing that standing timber shall remain an immovable, even when separated in ownership from the land on which it stands.

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That standing timber shall remain an immovable, and be subject to all the laws of the State on the subject of immovables, even when separated in ownership from the land on which it stands, provided that nothing in this act shall be construed as altering, affecting or modifying existing laws relative to the assessment and taxation of such timber.

"Section 2. Be it further enacted, etc., That all laws or parts of laws in conflict with this act be, and the same are hereby repealed."

Article XVI, Sections 5 and 6 of the 1921 Louisiana Constitution are as follows:

"§ 5. Cooperation with Federal Government.—All governing authorities of districts which have been, or may be created, are authorized to cooperate with the Federal Government in the construction and maintenance of the levees in this State, on such terms and conditions as may be provided by the Federal authorities and accepted by the State authorities."

"§ 6. Compensation for property used or destroyed for levee purposes—Tax levy.—Lands and improvements thereon hereafter actually used or destroyed for levee or levee drainage purposes, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value for the preceding year; provided that this shall not apply to batture, nor to property the control of which is vested in the state or any subdivision thereof for the purpose of commerce; and provided, further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed.

"If the district has no other funds or resources out of which such payment can be made, it may levy, on all

taxable property situated therein, a tax sufficient to pay for said property so taken, and for such streets and highways so relocated and restored, within the limits of any municipality of one hundred thousand population or over not to exceed one-fourth of one mill on the dollar, to be used solely in the district where collected. This shall not prevent the appropriation of said property before payment." [As amended, Acts 1928, No. 165, § 1, adopted, November 6, 1928.]"

Article 455 of the Louisiana Civil Code reads as follows:

"Art. 455. Public things; use of river banks. The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.

"Nevertheless, the ownership of the river banks belongs to those who possess the adjacent lands."

Article 665 of the Louisiana Civil Code reads as follows:

"Art. 665. Legal public servitudes. Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

"All that relates to this kind of servitude is determined by laws or particular regulations."

Article 2324 of the Louisiana Civil Code reads in part as follows:

"Art. 2924. Interest is either legal or conventional."

Legal interest is fixed at the following rates, to-wit:

"At five per cent on all sums which are the object of a judicial demand. Whence this is called judicial interest; . . . ."

CERTIFICATE

I, _____, hereby certify that a copy of this brief has been mailed to Simon E. Sobeloff, Solicitor General, Department of Justice, Washington 25, D. C., Perry W. Morton, Assistant Attorney General, Lands Division, Department of Justice, Washington 25, D. C., T. Fitzhugh Wilson, United States Attorney, Shreveport, Louisiana, and Roger P. Marquis and S. Billingsley Hill, Attorneys, Department of Justice, Washington, D. C., by first class mail, postage prepaid, this _____ day of _____, 1956.

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